

OCT 24 1997

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

In the Matter of )

)  
 Amendment of Part 90 of the Commission's  
 Rules to Facilitate Future Development of  
 SMR Systems in the 800 MHz Frequency  
 Band )

PR Docket No. 93-144  
 RM-8117, RM-8030  
 RM-8029

)  
 Implementation of Sections 3(n) and 322 of  
 the Communications Act - Regulatory  
 Treatment of Mobile Services )

GN Docket No. 93-252

)  
 Implementation of Section 309(j) of the  
 Communications Act - Competitive Bidding )

PR Docket No. 93-253

To: The Commission

**CONSOLIDATED**  
**SUPPLEMENT TO PETITIONS FOR RECONSIDERATION**

Small Business in Telecommunications (SBT) has previously submitted petitions for reconsideration to the Commission's Memorandum Opinion and Order and Second Report and Order ("the Orders") released July 10, 1997. Within its Petitions, SBT set forth those issues which it believes the Commission should resolve regarding its efforts to auction the 800 MHz radio spectrum and those issues shall not be reiterated herein. Over the past week, SBT has been made to recognize that the Commission failed to receive necessary approval of its definitions of "small business" as same apply to the rules proposed, including the auction rules created in accord with the Commission's Orders.<sup>1</sup> In accord with 15 U.S.C. §632, the agency

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<sup>1</sup> SBT's information comes to it from federal agency sources which are deemed reliable for the purposes of bringing this issue before the Commission. Since the failure of the Commission is in not performing an act, SBT is unable to demonstrate at this time the "negative" action of the Commission, i.e. that it did not do something which it was required to do.

must have submitted for approval its definitions for analysis and approval by the Administrator of the United States Small Business Administration prior to the issuance (or effectiveness) of the Orders. The Commission's failure to obtain the necessary approval renders its Orders a nullity due to the agency's failure to obtain all necessary authority to act.

The applicable statutory language is found at 15 U.S.C. §632 (a)(2)(C) which states:

Requirements. Unless specifically authorized by statute, no Federal department or agency may prescribe a size standard for categorizing a business concern as a small business concern, unless such proposed size standard -- (iii) is approved by the Administrator.

There can be no doubt that the Commission prescribed a size standard within its Orders which was not approved by the SBA Administrator.

At this writing, SBT has requested, but not received, notification that such approval has been obtained or that the Commission might obtain such approval prior to its auction date of October 28, 1997. What is clear, however, is that such approval would not be effective in reviving the Commission's Orders since the SBA Administrator is not empowered to approve size standardization issues following the issuance of an agency's order. The applicable statutory language states that an agency prescription must be approved as a "proposed" standard. Accordingly, the issuance of the Orders created, at best, a proposed size standard subject to SBA approval. That the size standard must be deemed proposed in accord with 15 U.S.C. §632, and not final, would toll the effectiveness of the Commission's Orders, including all auction rules created thereby, until such required approval is properly obtained. No other interpretation is possible if the SBA's jurisdiction is to be respected for the purposes described within the statute. Therefore, the Commission's Orders are not final in accord with law and must be set aside to

move the agency in compliance with 15 U.S.C. §632, or be republished to set forth a new, legally supportable effective date.

The effect of the Commission's failure to obtain the necessary approval is that its Orders must be deemed to be *ultra vires* acts or, in the alternative, the Commission erred in the creation of the effective date of the Orders. Title 15 is quite clear in that the agency must obtain such approval prior to the issuance of the agency's orders and nothing under Title 15 allows the Commission to seek or the SBA Administrator to provide such approval only following the issuance of an order with an immediate effective date. In effect, therefore, the SBA Administrator is not empowered to provide to the Commission or any other agency a remedy for an agency's failure to comply with the clear language of 15 U.S.C. §632.

It is vitally important that the Commission's auctions not be subject to scrutiny by courts which might seek to overturn the outcome of such auctions because the agency failed to provide to small business the legal assurances required under law. A small business participant should not be lured into acting under the Commission's directions, depending on those benefits provided within the Orders, only to discover that its use of bidding credits might be challenged within subsequent litigation by an unsuccessful challenger. By failing to obtain prior approval, the Commission has created this unnecessary risk and has called into question the finality and effectiveness of its rules.

To provide necessary compliance with Title 15 and associated regulation under 13 C.F.R. §121, to protect the small business participants within the Commission's auction, the Commission is left with no choice but to set aside its earlier Orders until such time as prior approval is received by the Small Business Administration, then reissue its Orders in accord with law. To do otherwise would be to state to the American public and the persons regulated by the Commission that the agency has discretion to violate statutory direction. How then, would the agency ever be able honestly to demand respect for the Commission's jurisdiction from other agency's or compliance with its own rules from its regulatees?

SBT respectfully requests that the Commission reconsider its Orders in accord with the foregoing, obtain necessary prior approval from the Small Business Administration, provide necessary time prior to the scheduling of its auction in accord with 47 U.S.C. §309(j)(3)(E), and take such other action that is necessary to cause its decisions and Orders to be rendered in accord with applicable statutory law.

Respectfully submitted,

SMALL BUSINESS IN TELECOMMUNICATIONS

By

  
Robert H. Schwaninger, Jr.

Dated: October 24, 1997

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## CERTIFICATE OF SERVICE

I, hereby certify that on this 24th day of October, 1997, I served a copy of this Consolidated Supplement to Petitions for Reconsideration via first-class mail, postage prepaid to the following:

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and via hand delivery to the following:

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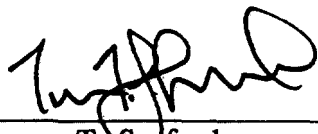
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